Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act Of 1996	)	CC Docket No. 96-98
Deployment of Wireless Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

REPLY COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Matthew J. Flanigan
President

Grant E. Seiffert
Vice President
External Affairs and Global Policy

Derek R. Khlopin
Director, Law and Public Policy

1300 Pennsylvania Avenue, NW
Suite 350
Washington, DC 20004

(202) 383-1480

July 17, 2002

EXECUTIVE SUMMARY

TIA is the principal industry voice for communications and information technology manufacturers and suppliers. TIA member companies design, build, and deploy the diverse array of broadband enabling technologies. TIA seeks and supports the timely adoption and implementation of national policies, especially critical for this industry right now, that incent investment in new, diverse and competitive communications technologies that are capable of delivering broadband capability, including high-speed Internet access services, to *all* residential and business consumers.

As it did in its initial comments in this proceeding, TIA urges the Commission to determine that the Section 251 unbundling obligations do not apply to "new," last mile facilities that are used for the provision of broadband services, while maintaining and examining the existing rules for legacy copper loops. TIA recommends including in this determination fiber-to-the-home systems, other fiber deployments, remote terminals, DSL and successor electronics, and other facilities necessary to extend the reach and robustness of broadband capability. TIA also supports the establishment of build-out requirements or benchmarks for wireline broadband services. Although it has advocated for several years the application of this type of regulatory framework to the broadband environment, TIA believes that the current depth of the crisis in the telecommunications industry should move the Commission to act in an especially expedited manner.

Finally, TIA emphasizes its support for the comments and reply comments filed in this proceeding by the High Tech Broadband Coalition, of which it is a founding member.

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act Of 1996	)	CC Docket No. 96-98
Deployment of Wireless Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

REPLY COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to Section 1.415 of the Commission's Rules,[1] the Telecommunications Industry Association (TIA) hereby replies to the comments submitted in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.[2] TIA is the principal industry voice for communications and information technology manufacturers and suppliers. As the companies designing, building, and deploying the diverse array of

---

[1] 47 C.F.R. § 1.415.

[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Service Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361 (rel. Dec. 20, 2001) ("*NPRM*").

broadband enabling technologies, TIA members stand to be impacted substantially by Commission decisions made during the course of this proceeding.

In the reply comments that follow, TIA reiterates its call for the timely adoption and implementation of national policies, as critical now as they ever have been, that incent investment in new, diverse and competitive communications technologies that are capable of delivering broadband capability, including high-speed Internet access services, to *all* residential and business consumers. As it did in its initial comments in this proceeding,[3] TIA continues to urge the Commission to not apply the Section 251 unbundling obligations to "new," last mile facilities that are used for the provision of these broadband services, while maintaining and examining the existing rules for legacy copper loops. TIA's recommendations include support for exempting from these regulatory requirements fiber-to-the-home systems as suggested by Corning Inc., as well as remote terminals, DSL and successor electronics, and other facilities necessary to extend the reach and robustness of broadband capability. TIA also supports the establishment of build-out requirements or benchmarks for wireline broadband services. Finally, TIA emphasizes its support for the comments and reply comments filed in this proceeding by the High Tech Broadband Coalition, of which it is a founding member.

I. INTRODUCTION.

TIA includes among its membership 1,100 large, medium and small companies that manufacture and provide communications and information technology products,

[3] Comments of the Telecommunications Industry Association (filed April 5, 2002) (hereafter "*TIA Comments*").

materials, systems, distribution services, and professional services in the United States and around the globe. TIA represents its members on the full range of public policy issues affecting the communications industry, forges consensus on industry standards, and organizes and co-owns SUPERCOMM, the world's largest annual communications exhibition and conference.

As stated in TIA's initial comments in this proceeding, TIA member companies have substantial and material interests in the policy issues implicated in this proceeding as they offer for sale to all classes of network service providers a wide range of landline and wireless communications technologies, both terrestrial and satellite, that enable broadband services including high-speed Internet access. TIA thus necessarily speaks with a voice that is both technology-neutral and service provider-neutral.

TIA has been focused for quite some time on widespread broadband deployment as the critical issue for the communications industry, and as a major economic stimulator for the national and global economy. TIA is among those believing that this matter has achieved even a greater significance in light of the near total economic and financial collapse of the telecommunications industry. FCC Chairman Michael Powell recently observed, "There is a severe capital crisis putting a tremendous strain on the telecommunications industry. It is imperative to do everything possible to restore investor confidence in this critical sector of the American economy."[4] Whether or not the damage that has been done is reversible, TIA suggests that the Commission can play a very meaningful role in helping to stabilize and begin building back up the industry by

[4] FCC News Release, *FCC Chairman Michael Powell Appointed to President Bush's Corporate Fraud Task Force* (July 9, 2002).

moving with urgency to adopt and promote a uniform regulatory policy that promotes increased and sustained facilities-based competition.

The enormous benefits of the timely and widespread availability of broadband services increasingly are being acknowledged in the U.S. and around the globe. Broadband deployment and adoption in this country, however, is not occurring as quickly as it could or should. Moreover, the investments are not being made that are necessary to both make broadband *ubiquitously* available and to continue increasing the capability of the access networks. The Commission cannot by itself, and indeed really ought not, insure that a particular type of advanced infrastructure blankets the country, nor can it cure all that ails the telecommunications industry. The Commission, however, does have a clear role, one that it seems to recognize, at least at times. Specifically, the Commission should selectively amend its rules to remove regulatory impediments and disincentives to the increased investment that is necessary to make broadband capability more widely available and more robust. TIA believes that in this proceeding, the Commission has the opportunity to do just this for "wireline" networks (referring to the evolving telecommunications infrastructure operated traditionally by local exchange carriers).

TIA believes that how the Commission applies the unbundling rules adopted pursuant to Section 251 represents a clear instance where a policy change can have an immediate and lasting impact on investment in communications networks. Specifically, a national rule that the unbundling obligations do not apply to new broadband access facilities holds the promise of making wireline networks a stronger broadband competitor to the cable industry and terrestrial and satellite wireless technologies now and into the future. Moreover, TIA is confident that the Commission can accomplish this objective comfortably within the statutory framework of the Telecommunications Act of 1996 such that any apprehension concerning judicial scrutiny dissipates.

TIA also reiterates its support for the adoption in this proceeding of build-out requirements or "benchmarks" that can afford the Commission an opportunity to review the progress of wireline broadband deployment and gauge the impact and success of the Commission's unbundling policies.

Finally, TIA, a founding member of the High Tech Broadband Coalition (HTBC), strongly endorses and supports the coalition's comments and reply comments in this proceeding.[5] HTBC is the manifestation of the remarkable coming together of the non-service provider broadband value chain (component suppliers, telecom and network equipment vendors, IT hardware and software companies, consumer electronics manufacturers, and manufacturers as users) around this notion that last mile investment in broadband must be deregulated.

II. INCREASED INVESTMENT IN BROADBAND-ENABLING INFRASTRUCTURE IS CRITICAL TO THE FUTURE OF THIS INDUSTRY AND TO THE ECONOMY.

In its initial comments, TIA laid out in detail the significance of widespread broadband deployment in terms of national economics, security and global

[5] Comments of High Tech Broadband Coalition (filed April 5, 2002) (hereafter "*HTBC Comments*"); Reply Comments of the High Tech Broadband Coalition (filed July 17, 2002) (hereafter "*HTBC Reply Comments*").

competitiveness.[6] Opening the 'last mile bottleneck' for all Americans in such a way that consumers are able to gain access to the Internet at increasingly higher speeds will mean a continued increase in the introduction of new applications that revolve around fast, interactive, content-rich broadband services. TIA believes that the Commission also must recognize that the plight of the telecommunications industry itself is inextricably linked to expanded investment in broadband-enabling technologies and their widespread deployment. Moreover, the ripple effects of a meaningful spike in this investment not only will then ignite the service provider segment of the market, it will flow through to the full information technology sector, and to the entire economy through, for example, productivity increases.

A. Broadband Investment and Deployment is Critical for the Stabilization of the Battered Telecom Sector.

We all are far too familiar with the state of the telecommunications industry, and certainly have been unpleasantly surprised by the depths of this collapse. Communications equipment suppliers are suffering across the board. Even the wireline network operators that have managed to stay solvent are continuing to drastically cut their spending, as in the U.S. alone, carrier capital expenditures dropped from $112 billion in 2000 to $96 billion in 2001, and now conservatively are projected to drop an estimated 34 percent this year to $63 billion.[7] As a result, the communications equipment

---

[6] TIA Comments at 7-12; *see also* HTBC Comments at 5-16.

[7] UBS Warburg, *Global Telecom Equipment Analyzer, The Telecom Winter Continues* (June 2002). Moreover, other analysts have estimated the figure for 2002 as low as $51 billion. *See* James P. Parmelee, *Telecom Equipment – Wireline Update,* Credit Suisse First Boston (June 26, 2002).

sector is continuing to see mounting financial losses and increased cutbacks beyond the over half a million layoffs already implemented or announced.[8] Some of the major equipment vendors have cut as much as half of their work forces over the last year and virtually none are profitable.[9] No end to this downward spiral is in sight, as projections for the near future do not look much better. Given current marketplace conditions, industry analysts predict that equipment manufacturers will be forced to continue significant job and operational cutbacks over the next two years and that the industry will not see even any kind of recovery until *at least* late 2003 or 2004.[10] To top it off, somewhere in the neighborhood of half a trillion dollars of investment has evaporated.[11]

The Commission by itself certainly cannot cure all that ails the industry. It can, however, play a very important role by establishing a stable regulatory environment that does not distort or diminish network operators' incentives to increase their investment in broadband-enabling facilities. From TIA's perspective, this would offer the beleaguered equipment manufacturing sector a critical boost. Moreover, it would jumpstart the entire

---

[8] *See, e.g.*, *No Break for Telecom Equipment Companies*, Communications Today, (May 9, 2002); Sandra Swanson and John Rendleman, *Telecom Blues Pound Service Providers and Manufacturers*, Information Week, (Apr. 29, 2002).

[9] *See* Sudeep Reddy, *Start-up Telecom Manufacturers Switch Gears As Major Equipment Firms Cut Staff*, The Dallas Morning News (Apr. 29, 2002); *No Break for Telecom Equipment Companies*, Communications Today (May 9, 2002) (noting that only one company in the sector is profitable). *See* Letter to the U.S. Senate from Matthew J. Flanigan (dated May 20, 2002) ("TIA member companies alone have laid off over 400,000 employees globally").

[10] *See Telecom Equipment Turnaround Not Expected Until 2003-2004*, Communications Daily (Mar. 11, 2002).

[11] Peter S. Goodman, *Telecom Sector May Find Past Is Its Future*, Washington Post (July 7, 2002) at A1.

telecom sector, a sector that must rebound in order for the nation's economic condition to return to sustainable, long-term growth.

B. It is Imperative that ILECs Invest Significantly In Order to Make Current-Generation and Next-Generation Broadband Technologies Widely Available.

Incumbent local exchange carriers (ILECs) clearly are the principle class of facilities-based residential "last mile" telecommunications service providers. By virtue of their control of "essential" facilities, conduits and rights-of-way, effectively they are the "gatekeepers" of the national, local wired telecommunications infrastructure. While many communications companies of course contribute to the functioning and upkeep of the telecommunications network, logically, the ILECs truly are the ones in position to upgrade and extend the local access parts of the network to enable broadband capability.

By no means is TIA disparaging the contributions of the competitive industry. The point is that, fundamentally, competitive local exchange carriers (CLECs) with business models relying at least in large part on the availability of UNEs are more likely to offer competitive broadband services *only after* the enabling infrastructure is in place.[12] As a result, it is important to a broadband future for the country that the ILECs make these needed investments. An upgraded "wireline" telecommunications infrastructure can be an important competing platform to the high-speed networks of

[12] *See* Comments of the Fiber-to-the-Home Council (hereafter "FTTH Council Comments") at 5 (observing that 78% of ILEC competitors that have built FTTH networks have done so in locations where the incumbents operated but without broadband-capable networks available for resale, implying that "when broadband UNEs are available, CLECs will choose to resell ILEC services as opposed to construct their own facilities-based competitive broadband networks").

cable operators, as well as to those based on evolving terrestrial wireless and satellite technologies. This calls for a massive level of investment in the telecom network on a national scale.[13]

As already discussed, however, the level of investment in telecom networks is dropping precipitously. For their part, ILECs reduced their capital expenditure budgets in both 2001 and 2002,[14] and are poised to do so again for 2003. As a result, their collective investment in broadband and high-speed networks essentially has come close to a screeching halt. A primary and immediate result is that the local exchange networks are not being upgraded and expanded in a way that enables the more remotely located subscribers to have access to DSL services. Moreover, and of significant concern for the nation's future, ILECs for the most part also continue to lay copper in new builds and total plant rehabilitations when forward-looking and bandwidth-rich fiber solutions can be deployed economically.

III. A COMMISSION DETERMINATION TO NOT REQUIRE UNBUNDLING OF BROADBAND ACCESS FACILITIES WILL PROMOTE GREATLY NEEDED INFRASTRUCTURE INVESTMENT.

The Commission needs to address the regulatory barriers to new investment in the deployment of broadband and high-speed Internet access technologies to all residences

---

13 *See* Comments of the Progress and Freedom Foundation (hereafter "*PFF Comments*") at 9 ("the construction of telecommunications networks to support ubiquitous access to advanced broadband services is a very capital intensive undertaking").

14 *See, e.g.*, Mike Angell, *Telecom Hitting Bottom—Maybe*, Investor's Business Daily (May 7, 2002) (citing announcements by the regional Bell operating companies that capital spending in 2002 will be cut by 14 to 44 percent).

and businesses. TIA renews its call for the Commission to adopt a sense of urgency in making the difficult but critical decisions that will begin shaping the broadband regulatory paradigm,[15] and the unbundling issues at the center of this rulemaking proceeding should be the priority.[16]

A. Regulation Can Act as a Roadblock to Broadband Deployment by Reducing Incentives to Invest in New and Expanded Networks.

As TIA outlined in its initial comments, the association has a long history of urging the government to take steps to remove obstacles to broadband deployment, beginning with its support for the inclusion of Section 706 in the Telecommunications Act of 1996.[17] In the course of the Commission's Section 706 inquiries, TIA has maintained that advanced telecommunications capability has not been deployed "in a reasonable and timely manner," that the Commission should set higher thresholds for interpreting the capability envisioned in Section 706, and that the Commission should take deregulatory steps to advance deployment.[18]

---

[15] *See* Letter to the Honorable Michael K. Powell, Chairman, Federal Communications Commission, from Matthew J. Flanigan, President, Telecommunications Industry Association (Dec. 5, 2001) (available at http://www.tiaonline.org/pubs/press_releases/TIA_Powell_Ltr_120501.pdf).

[16] *See* Letter to the Honorable Michael K. Powell, Chairman, Federal Communications Commission, from Matthew J. Flanigan, President, Telecommunications Industry Association (June 4, 2002) (available at http://www.tiaonline.org/media/powell_une_ltr_060402.pdf).

[17] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[18] Reply Comments of the Telecommunications Industry Association, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket

Moreover, almost three years ago TIA offered its detailed proposal to the Commission for providing relief from the unbundling rules for new broadband-capable facilities.[19] TIA has continued to renew this call.[20] The participation in this proceeding of the very diverse High Tech Broadband Coalition (HTBC) makes it evident that this type of regulatory approach to investment in broadband and high-speed Internet access facilities has gained wide support.[21]

TIA has called on President George W. Bush to set a national broadband vision and policy, focusing on the economic and social benefits of the technologies and the critical role government can play.[22] An important recommendation to the President was for his Administration to support modifying the Commission's regulations "to relieve

---

No. 98-146 (filed Oct. 9, 2001) (hereafter *"TIA Section 706 Reply Comments"*); "The Future of Broadband: A Case for FCC Action to Spur Deployment of Advanced Telecommunications Capability," TIA, filed as an *ex parte* submission in CC Docket No. 98-146 (Dec. 23, 1998); Letter from Matthew Flanigan, TIA President, to the Commission, filed in CC Docket No. 98-146 (Oct. 8, 1998).

[19] Letter to the Honorable William E. Kennard, Chairman, Federal Communications Commission, from Mathew J. Flanigan, President, Telecommunications Industry Association, filed in CC Docket No. 96-98, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (Aug. 2, 1999) (hereafter *"TIA 1999 UNE Filing"*).

[20] *See TIA Section 706 Reply Comments* at 9-11; Comments of the Telecommunications Industry Association, *Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications*, NTIA Docket No. 011109273-1273-01 (filed Dec. 19, 2001).

[21] *See generally* HTBC Comments.

[22] *See* Letter to the Honorable George W. Bush, President, United States of America, from Matthew J. Flanigan, President, Telecommunications Industry Association (Oct. 4, 2001) (available at http://www.tiaonline.org/pubs/ press_releases/letter_bush_100401.pdf) (*hereafter TIA Letter to President Bush*).

telecommunications service providers of the so-called federal and state 'unbundling' obligations on *new broadband network components* in order to give them the necessary incentives to invest."[23]

Finally, TIA reminds the Commission that its positions on broadband deployment policy are consistent across technology platforms. TIA believes that, to the extent feasible, regulatory burdens should not vary by the chosen delivery platform for services that essentially are functionally equivalent. Importantly, however, TIA strongly believes that this move to a more "level playing field" for broadband should be deregulatory and should not impose legacy regulatory models on nascent technologies and services. For this reason, TIA has supported the Commission not imposing "open" or "forced" access obligations on high-speed cable modem Internet access services.[24]

B. Network Operators Should Not Be Required to Unbundle and Make Available New Last Mile Broadband Facilities.

As TIA and many others have explained, it seems rational for a network operator to reduce or simply stop investing in new or upgraded network facilities if it fears bearing all of the risks of these investments while being forced to share any resulting rewards

---

[23] *Id.*

[24] Comments of the Telecommunications Industry Association, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52 (filed Dec. 1, 2000) at 25 ("Cable operators have been investing heavily to upgrade the cable plant in order to provide residential high-speed Internet access and other services. These efforts have been undertaken outside the shadow of government-imposed open access regulation.")

with its competitors.[25] In such instance, the regulatory obligations threaten to reduce the return on investment while increasing the risks, thereby undermining the incentive to innovate.

TIA stated in it comments that, in terms of application of the unbundling requirements of Section 251,[26] the Commission can and should draw a line between the ILECs' legacy copper loop and the facilities necessary to support high-speed Internet access and broadband services. Other commenters agree with TIA's position that the Commission should determine that the latter class of facilities should not be subject to the unbundling obligations.[27] This action is critical if broadband policy is going to help, rather than hinder, prospects for the increased investment in technology upgrades that are necessary to make broadband services more widely available.[28]

For wireline broadband services to be available to a substantial number of consumers, fiber must be pushed out further and further into the telecommunications network, *i.e.* first to remote terminals and eventually beyond, and electronics components upgraded. For example, TIA agrees with Corning's conclusion that the application of,

---

[25] TIA Comments at 13-14; Comments of Alcatel USA, Inc. (hereafter "*Alcatel Comments*") at 11; Comments of Next Level Communications (hereafter "*Next Level Comments*") at 5-8; Comments of Corning, Inc. (hereafter "*Corning Comments*") at 3-5; Comments of Catena Networks, Inc. (hereafter "*Catena Networks Comments*") at 9; PFF Comments at 25-27.

[26] *See* 47 U.S.C. § 251(b).

[27] *See, e.g.,* HTBC Comments at 26-35; Catena Networks Comments at 9-12; Next Level Comments at 7-14; Alcatel Comments at 15-16.

[28] *See, e.g., Abernathy Sees 'Limited" FCC Role in Wake of WorldCom Woes,* Communications Daily (July 10, 2002) at 4-6 (FCC Commissioner Kathleen Abernathy noting that "telecom by its very nature is very capital intensive").

and even the mere threat of, the Section 251 unbundling obligations to fiber-to-the-home (FTTH) systems act as an unnecessary deterrent to investment in these capacity-rich, scalable technologies.[29] Corning submitted a study with its comments showing that substantially increased deployment of FTTH systems could be expected and justified in the absence of regulatory obligations such as application of the unbundling rules.[30] The study's conclusion is that FTTH would be economically feasible in wire centers corresponding to 31 percent of households in such a "free market" scenario versus only in wire centers corresponding to 5 percent of households in a more regulated scenario.[31] It also estimated that ILECs would make an additional $39 billion in capital expenditures relating to FTTH over the next ten years in the less regulated scenario.[32]

The High-Tech Broadband Coalition has submitted into the record of this proceeding a study that reaches similar conclusions regarding the impact of the unbundling rules on investment. The authors, Doctors Haring and Rohlfs, conclude that

---

[29] Corning Comments at 3-9. *See also* FTTH Council Comments at 2, 5; Alcatel Comments at 16 (advocating that the network unbundling and prices rules should not apply to new and overhauled networks, including among other things FTTH); PFF Comments at 35.

[30] Cambridge Strategic Management Group, *Assessing the Impact of Regulation on Deployment of Fiber to the Home: A Comparative Business Case Analysis* (Apr. 5, 2002) (hereafter "*CSMG Study*"), Attached to Corning Comments.

[31] CSMG Study at 11.

[32] *Id*. at 13.

current and potential Section 251 unbundling obligations would deter ILECs from investing some $20 billion in new, last mile broadband facilities.[33]

This discussion demonstrates that support exists in the record of this proceeding for TIA's view that the unbundling rules are impeding the new network investment that is needed, and that changes in marketplace conditions warrant their updating. In other words, a new or modified regulatory approach is appropriate for investment in broadband facilities. Moreover, this can be accomplished while leaving the regulatory regime in place for the core copper "local loop" facilities, so long as oversight of ILEC compliance with the Telecom Act's requirements for the core local loop remain vigilant and enforcement is carried out swiftly and effectively.

TIA therefore reiterates its position that the Commission in this proceeding must conclude that ILECs are not required to provide unbundled access to new, last-mile broadband facilities.[34] More specifically, the Section 251 unbundling obligations should not apply to any configuration of fiber, remote terminals, DSL and successor electronics, or any other similar wireline facilities that are used to provide high-speed Internet access or broadband services. Under this approach, ILECs would and should remain obligated to offer unbundled copper loops that could be used as part of DSL or other service offerings, and also would have to continue offering collocation space in their central offices at regulated, compensatory rates.

---

[33] John Haring and Jeffrey H. Rohlfs, *The Disincentives for ILEC Broadband Investment Afforded by Unbundling Requirements* (July 16, 2002), attached as Appendix A to HTBC Reply Comments.

[34] TIA Comments at 14-24.

Network operators should have the flexibility to determine how best to configure their networks to support current and especially next-generation broadband services. New broadband facilities that would not be subject to unbundling requirements might include, for example, the type of network architecture outlined by SBC in its Project Pronto initiative.[35] It also could be a Very High-Speed DSL (VDSL) system, or FTTH or fiber-to-the-curb, including emerging passive optical network (PON) architectures. Or it might be a novel approach not yet unveiled but equally or even more efficient and effective. The point is that the Commission need not, and indeed should not, be overly restrictive in describing how a network must be configured in order to qualify for a lightened regulatory burden. The focus must be on whether, and not precisely how, the crucial objective is being achieved: making wireline broadband services far more capable and much more widely available.

TIA also notes that because the existing copper loops still would have to be made available to ILEC competitors, this relief should apply regardless of whether, in addition to enabling the network operator to offer broadband services, the new facilities could also support the provision of voice services. Manufacturers continue to introduce innovative equipment that allows network operators to converge their voice and data traffic in a way that maximizes their network investments. The Commission should not adopt policies that have the effect of discouraging operators from leveraging their existing facilities

[35] *See SBC Launches $6 Billion Initiative To Transform It Into America's Largest Single Broadband Provider*, News Release, SBC Communications, Inc., San Antonio, Texas (Oct. 18, 1999).

when they upgrade their networks to provide new services as they begin the transition to next-generation networks.

TIA also supports conditionally allowing ILECs to "retire" copper loop facilities once their continued maintenance becomes an inefficient expense of resources and their utility has been superseded by a next-generation network architecture.[36] An ILEC should be permitted to retire legacy facilities *only* after it (1) enters into a voluntary, negotiated agreement with at least one unaffiliated CLEC for access to its broadband facilities and (2) commits to offering the rates set forth in the agreements to other CLECs on a non-discriminatory basis. This approach of course means that CLECs will be able to reach their customers with their service offerings because they will have access to either the legacy copper loop under existing regulations or to the next-generation facilities at commercially negotiated rates.

IV. NARROWING UNBUNDLING OBLIGATIONS IS CONSISTENT WITH THE LANGUAGE AND PURPOSE OF THE TELECOMMUNICATIONS ACT OF 1996, AS INTERPRETED BY BOTH THE COMMISSION AND THE COURTS.

TIA agrees with the commenters who demonstrate that the Commission has the clear legal authority to determine that the Section 251 unbundling obligations do not apply to new, last mile broadband access facilities.[37] Such a Commission determination would comply fully with the specific statutory requirements of the Telecommunications Act of 1996 while fulfilling the law's overriding objectives of promoting facilities-based

---

[36] *See* HTBC Comments at 36-37.

[37] TIA Comments at 20-24; HTBC Comments at 35-47;

competition, investment in advanced communications infrastructure, deployment of broadband services, and continued innovation.[38]

A. Section 706

TIA's view that all Americans should have access to broadband communications services[39] also is an underlying purpose of the 1996 Act and the specific goal of its Section 706.[40] Moreover, if the United States is to maintain a leading position among the world's top information technology economies, ubiquitous broadband deployment is essential.

The 1996 Act, and Section 706 in particular, obligate the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[41] Section 706 further states that the Commission has tools at its disposal to accomplish this, including "regulatory forbearance, measures that promote competition in the local telecommunications market,

---

[38] *See* Remarks of Michael K. Powell, Chairman, Federal Communications Commission, National Summit on Broadband Deployment (Oct. 25, 2001) ("broadband should exist in a minimally regulated space. Substantial investment is required to build these networks and we should limit regulatory costs and uncertainty. We should vigilantly guard against regulatory creep of existing models into broadband, in order to encourage investment.").

[39] *See TIA Letter to President Bush, supra* note 22.

[40] *See* Pub. L. No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 ("Section 706").

[41] *See* Pub. L. No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 ("Section 706").

or other regulating methods that remove barriers to infrastructure investment."[42] TIA believes that the clear mandate of Section 706 and the goals of the 1996 Act support a Commission determination to not apply Section 251 unbundling obligations to new, last mile broadband facilities.

TIA entirely disagrees with commenters advocating that policymakers take a "hands off" approach to broadband deployment at this point in time and wait for a rise in consumer demand.[43] It may be true that in its early life and at first blush, the broadband services market could appear to be demonstrating a typical diffusion pattern where some consumers have access to services at an earlier point in time than others and eventually the "take up" rate spikes upward. The question, however, is whether we can expect *all* Americans to get broadband access in a reasonable period of time and, if not, what should be done about it? The problem with the broadband services market is that artificial barriers have been erected through regulation. This poses a real threat to real widespread broadband diffusion – particularly on the wireline side. Again, discretionary capital expenditures are needed in order to broadband-equip the wireline networks, and the regulatory disincentives to doing so are real. Particularly in the midst of the current telecom industry economic crisis, these are far more than "costs of doing business" and instead bring this type of investment to a near complete halt. The bottom line is that TIA

---

[42] 1996 Act, § 706(a).

[43] *See, e.g.,* AT&T Comments at 69; ALTS Comments at 14-15; CompTel Comments at 31-33.

is not asking the Commission to artificially stimulate demand, but to simply remove unnecessary regulatory impediments to network expansion and upgrading.[44]

Contrary to the opinions expressed by some,[45] the record in this proceeding also demonstrates that unbundling and related regulation reduce not only the incentive of the incumbent network operator, in this case the ILEC, to invest in deploying innovative broadband enabling technologies, but also that of the competitor that relies on its facilities as well.[46] A CLEC has no reason to invest heavily in communications network infrastructure, with the inherent risks, if it can rely on the ILEC to assume that responsibility.

Moreover, if the Commission is to further a national telecommunications policy that is faithful to the 1996 Act, it should emphasize the promotion of facilities-based competition, including between ILECs and broadband service providers not relying at all on the traditional wireline network. The existence in the market of similar services offered over competing technology platforms expands the universe of continued innovative breakthroughs and reduces reliance on a single class of infrastructure. In this proceeding, the Commission has the ability to address and remove regulatory obstacles to increased deployment by one class of competitor, the wireline broadband network operator. In turn, increased investment by the wireline network operator holds the

---

[44] See PFF Comments at 11.

[45] *See, e.g.,* Comments of the CLEC Coalition at 10-11; Comments of WorldCom at 82-90; AT&T Comments at 45-57.

[46] *See* FTTH Council Comments at 5; CSMG Study at 3.

promise of triggering continued and future responses from cable, wireless, and satellite providers, with the result being that broadband communications connections become more widely available, more innovative, and more capable.[47] Such result would be a welcome boost to a telecom sector sorely in need of one.

B. Section 251.

Among others, TIA in its initial comments laid out the analysis of how a Commission determination that Section 251 does not require the unbundling of new, last-mile wireline broadband facilities was consistent with then-current Court and Commission precedent.[48] In short, access to these facilities is not necessary for competitors to offer competing broadband services, nor does their unavailability "materially diminish" an entrant's ability to provide such services.[49] Further, the Commission also is compelled to look at other factors beyond this threshold analysis.[50] Contrary to the opinions of some commenters,[51] Section 251(d)(2)'s "at a minimum" language requires the Commission to draw a distinction between unbundling of facilities used solely for analog voice telephony and those used for advanced technologies, *i.e.,*

---

[47] HTBC Comments at 33.

[48] *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

[49] *See* TIA Comments at 21-23*;* HTBC Comments at 38-45; Alcatel Comments.

[50] 47 U.S.C. § 251(d)(2); *UNE Remand Order*, ¶ 106.

[51] *See, e.g.,* Comments of Covad at 32; CLEC Coalition Comments at 12, 37; WorldCom Comments at 101-02.

broadband services.[52] It also affords the Commission the discretion to not apply Section 251 unbundling obligations to new, last mile broadband facilities in order to meet the clear mandate of Section 706 and a principle goal of the 1996 Act – broadband investment and deployment, all within the Act's pro-competitive and deregulatory framework.[53]

TIA believes that the recent opinion from the U.S. Court of Appeals for the D.C. Circuit[54] only makes the case more compelling for demonstrating that new last mile broadband facilities do not fit under the "impair" standard of Section 251.[55] This is because the court recognized the investment disincentives inherent in mandated unbundling under Section 251[56] and chided the Commission for failing to fully address the availability of competitive alternatives to the ILEC platform for the delivery of broadband services.[57]

As TIA and others noted in their initial comments, high-speed Internet access and broadband services are being delivered to subscribers over a variety of competing

---

52 *NPRM*, ¶ 24.

53 *See* Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., at 1 (1996).

54 *United States Telecom Association v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("*USTA v. FCC*").

55 *See* HTBC Reply Comments at 17-25.

56 *USTA v. FCC* at 424.

57 *Id.* at 428.

technology platforms.[58] Contrary to the opinions of some commenting parties,[59] the Commission's analysis must recognize these intermodal providers as competitive alternatives to the incumbent's network as access to the latter's last mile facilities is not the sole means to reach customers.[60] Further, unbundled copper loops remain available to competitors who are free to invest in their own broadband-enabling electronics and other facilities as necessary.

C. The Commission Can and Must Preempt State Efforts to Expand Unbundling Obligations for Broadband Infrastructure.

TIA supports the view that a minimal and consistent regulatory environment is necessary to encourage the enormous investment needed for ubiquitous broadband deployment.[61] Since the Commission is best positioned to establish the necessary regulatory clarity and determine which regulations are required, if any, for broadband services and access, the Commission should retain exclusive regulatory jurisdiction.

The Commission should forcefully make it clear that once it determines that a network element is not subject to unbundling under Section 251, state public utility commissions cannot require it. Any regulatory certainty stemming from the Commission determination would then be completely undermined. The result would be that carrier

---

58 *See* TIA Comments at 22; Alcatel Comments at 24.

59 *See, e.g.,* AT&T Comments at 39-40; CLEC Coalition Comments at 20; Covad Comments at 33.

60 *NPRM*, ¶ 28.

61 *See* Catena Networks Comments at 15-16.

investment decisions and deployment patterns would vary from state to state, certainly a contrary result to a goal of national, widespread broadband deployment.

Fortunately, a proper interpretation of the law will prevent the feared result. Section 251(d)(2) directs the Commission to determine which "network elements should be made available."[62] Congress thus explicitly gave this authority to the Commission and not the states.[63] Meanwhile, the Section 261(c) authority for states to require unbundling only holds insofar as any such requirements are not "inconsistent with [Part II of Title II of the Communications Act] or the Commission's regulations implementing this part."[64] As a result, a Commission determination that new, last mile broadband facilities are not subject to Section 251 unbundling cannot effectively be overturned by a state initiative.

D. The Commission Should Establish Build-Out Requirements or Benchmarks for ILEC Deployment of Wireline Broadband Facilities.

As outlined in its initial comments,[65] TIA supports adoption in this proceeding of attainable, yet substantial build-out requirements or "benchmarks" for wireline broadband services, in conjunction with relief from unbundling of new, last mile broadband facilities. TIA first suggested the approach of linking unbundling and other regulatory relief to deployment schedules during the first Section 706 Inquiry and such Commission

---

62 47 U.S.C. § 251(d)(2).

63 Corning Comments at 30-31.

64 47 U.S.C. § 261(c).

65 TIA Comments at 24-26.

action has precedent.[66] In this instance, this type of benchmarking can afford the Commission an opportunity to review the progress of ILEC broadband deployment and gauge the impact and success of its unbundling rules.

Facilities-based competition and investment are critical to a competitive, innovative market for broadband services. Utilizing Benchmarks in the context suggested here is consistent with these goals, the bedrock principles underlying the 1996 Act, in particular Section 706. TIA believes that not applying the unbundling rules to new broadband facilities will result in their widespread deployment, and requirements to follow-through on this realistic assumption would be fair and not unduly burdensome.

The build-out requirements in this proceeding ideally should include two components: a percentage of customers served and required bandwidth speeds. In order to be effective, they likely need to be provider-specific as well to take into account, among other things, the varying current broadband deployments, and geographic and demographic considerations. As HTBC states in its comments, the "resulting deployment schedules should be aggressive, attainable, and economically rational from a business perspective."[67]

---

[66] *Id*.

[67] HTBC Comments at 48.

V. CONCLUSION.

A deregulatory approach to the broadband market is necessary to support and encourage the necessary investments. As did in its initial comments, TIA urges the Commission to determine that the unbundling rules, adopted pursuant to Section 251 of the Telecommunications Act of 1996, do not apply to new, last mile broadband facilities. TIA's recommendations, supported by the record in this proceeding, include exempting from these regulatory requirements fiber-to-the-home systems as proposed by Corning, Inc., among others, as well as remote terminals, DSL and successor electronics, and other facilities necessary to extend the reach and robustness of broadband capability. This conclusion is entirely consistent with the full framework of the 1996 Act, as the rules can be kept in place that require, for example, copper loops to be made available on an unbundled basis and collocation space in central offices to be offered to ILEC competitors. TIA believes that removal of these regulatory roadblocks will result in increased investment in wireline broadband networks, spurring investment and innovation in competing broadband platforms.

TIA urges the Commission to adopt its recommendations set forth above and in its comments, and in the complementary comments and reply comments of the High Tech Broadband Coalition.

Respectfully submitted,

Telecommunications Industry Association

____

Matthew J. Flanigan
President

Grant E. Seiffert
Vice President
External Affairs and Global Policy

Derek R. Khlopin
Director, Law and Public Policy

1300 Pennsylvania Avenue, NW
Suite 350
Washington, DC 20004

(202) 383-1480

July 17, 2002